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No. 76-1468

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN F. HENDRIX, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was denied a fair trial because a juror was biased against him.

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of transporting and conspiring to transport illegal aliens, in violation of 18 U.S.C. 371 and 8 U.S.C. 1324.[1] He received three years' pro-

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[1] Petitioner was indicted on one count of conspiring to transport illegal aliens, in violation of 18 U.S.C. 371, four

bation and a $1500 fine. The court of appeals affirmed in a thorough opinion (Pet. App. A; 549 F.2d 1225).

At the end of the first day of the two-day trial, defense counsel informed the court that one of the jurors, while awaiting voir dire, had allegedly made statements that defense counsel believed demonstrated prejudice; counsel requested an investigation. The court denied the request and instructed counsel to submit affidavits in support of the allegation.

Approximately one week after petitioner's conviction, defense counsel moved for a new trial, submitting affidavits from petitioner's wife and mother-in-law that they had had a conversation with Mrs. Donnis J. Thompson prior to the trial. Mrs. Thompson, then a prospective juror, was reported to have made the following statement (Pet. 7).

> Well, I really shouldn't be serving today because my husband is on vacation, and he asked me to get excused so I can join him, because I have served on jury duty several times. But we just had a case where a police woman was tried for selling narcotics and that damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around.

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counts of inducing illegal entry of aliens (8 U.S.C. 1324(a)(4)), four counts of smuggling aliens (8 U.S.C. 1324(a)(1)), and six counts of transporting aliens (8 U.S.C. 1324(a)(2)). He was convicted of the conspiracy charge and the six transportation counts and was acquitted on the other counts (Pet. 4-5).

Mrs. Thompson was subsequently selected to serve on petitioner's jury.

At a hearing on the motion for a new trial, the district court examined the affidavits and denied the motion (Tr. 334-335). In an extensive opinion on which we rely, the court of appeals concluded that the district court did not abuse its discretion in considering the affidavits and ruling that, regardless of the truth of the statements alleged therein, they presented insufficient evidence of prejudice to warrant a new trial (Pet. App. 22 n. 4).

1. As both the district court and the court of appeals noted, the statements were made before the prospective juror had been selected or sworn and before she indicated to the court under oath that "she wasn't prejudiced" (Tr. 334; Pet. App. 15). Mrs. Thompson ambiguously asserted her duty to "put some of these people away," but as the court of appeals concluded, "these people" may well refer to those who are "absolutely guilty" and not, as petitioner claims, all criminal defendants (Pet. App. 23). We note that the jury acquitted petitioner of more than half the counts on which he was indicted (see note 1, *supra*). Given the timing and nature of the juror's statement, the circumstances in which it was allegedly made, and the fact that the verdict indicates that the jurors carefully considered the evidence in the case, there was no abuse of discretion in denying the motion for a new trial.

2. Contrary to petitioner's assertion (Pet. 8-10), there is no conflict between the decision below and

the law in the Fifth Circuit. The original decision in *United States* v. *McKinney*, 429 F. 2d 1019 (C.A. 5), which the decision below discusses (Pet. App. 18-20) and upon which petitioner relies, was heard before a panel consisting of Judges Rives, Goldberg and Godbold. In a 2-1 opinion, Judge Godbold dissenting, the panel announced a rule requiring a hearing whenever juror misconduct is alleged. After rehearing, however, Judge Rives changed his vote and, with Judge Godbold, voted to affirm the conviction, stating:

> We simply chose the wrong vehicle to undertake the development of a general rule as to the duty of a district judge in deciding a defendant's motion for new trial when jury misconduct is alleged. Indeed, I do not think that our Court should in any case undertake to promulgate such a general rule. The past literature on the subject is voluminous and shows that the question has arisen under an almost infinite variety of circumstances. Continued development of the jurisprudence can best be accomplished by deciding each case on its own peculiar facts and circumstances.

United States v. *McKinney*, 434 F. 2d 831, 833 (C.A. 5) (footnote omitted). Judge Goldberg's original majority opinion, upon which petitioner relies, became the minority opinion (*id.* at 833-834). Thus, *McKinney* refused to adopt a general rule requiring a hearing and relied instead on the trial court's discretion, to be reviewed on appeal in light of the circumstances of the particular case. This decision is entirely consistent with the opinion below. Indeed

the court below (apparently unaware of the decision on rehearing) chose to follow Judge Godbold's original dissent (Pet. App. 18-20). There is thus no conflict requiring the attention of this Court.

Nor is the decision below in conflict with *Remmer* v. *United States*, 347 U.S. 227. In *Remmer*, a juror reported a bribe attempt to the judge. The judge consulted with the prosecuting attorneys, ordered an F.B.I. investigation of the incident and, with the prosecutors, received the F.B.I. report and decided to drop the matter. The defendant knew nothing about the alleged bribe attempt, the consultation between judge and prosecutors, the F.B.I. investigation, or the F.B.I.'s report until after the verdict. This Court disapproved the trial court's *ex parte* actions and vacated the conviction. But that case is a far cry from the present one, where the only "*ex parte*" action alleged by the petitioner is the trial court's denial of a motion without hearing. This denial was entered after the court heard from both the prosecutor and petitioner's counsel (Tr. 333-334) and was in no sense "*ex parte.*"

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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